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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERMAN WOODS, Defendant and Appellant.	A152522 (San Francisco County Super. Ct. No. SCN222826)

Defendant German Woods was convicted by a jury of 16 counts arising out of seven separate burglaries, most of which involved elderly occupants of apartments in San Francisco. The jury also found true numerous enhancements, and defendant admitted 11 prior serious crimes, three of which were prison priors. Defendant was sentenced to 327 years to life in prison, consecutive to an indefinite life term.

Defendant makes five arguments on appeal: (1) the trial court erred in allowing a police officer to give lay identification testimony, resulting in error on three of the counts; (2), (3), and (4) the trial court erred in three respects in sentencing, including imposing an elder abuse enhancement on two counts, an enhancement the prosecutor did not allege and the jury did not find true; imposing the sentence of 327 years to life, consecutive to an indefinite life sentence; and failing to stay punishment for four of the counts pursuant to Penal Code section 654; and (5) defendant's sentence results in cruel and unusual punishment.

We reject defendant's first argument and thus affirm the conviction on the three counts to which the argument is directed. The Attorney General agrees with defendant

on all three of his sentence-based claims, and thus that the two unauthorized elderly victim enhancements should be stricken, defendant's sentence should be modified, and punishment for four of defendant's convictions should have been stayed. We thus remand the matter for resentencing, without the need to address defendant's last argument, as defendant's sentence will necessarily be different than the one he attacks here as cruel and unusual.

BACKGROUND

Between April 19 and July 13, 2014, defendant burglarized seven apartments in multi-unit apartment buildings located in the Chinatown and Japantown neighborhoods in San Francisco, most of which were occupied by elderly residents. During the burglaries, defendant also robbed the victims, many of whom he also injured.

Defendant has filed a comprehensive, 72-page opening brief, 18 pages of which are devoted to a detailed discussion of the seven incidents. The Attorney General's brief also has an extensive, though somewhat shorter, discussion of the facts. With one exception, we see no need to recite the facts of the crimes, as they are not germane to the issues before us, which in no way implicate the evidence. The only exception is one item of evidence admitted in connection with counts 6, 7, and 8, the counts arising out of an April 30 burglary on Post Street, specifically testimony arising out of a surveillance camera at that location, leading to the challenged testimony of a police officer as to what is depicted on the surveillance camera, as will be discussed in connection with defendant's first argument.

In September 2016, the district attorney charged defendant with 17 separate crimes based on the seven incidents. The charges were: five counts of first degree residential robbery (Pen. Code, § 211; counts 1, 6, 9, 12, and 14)[1]; seven counts of first degree residential burglary (§ 459; counts 2, 4, 5, 7, 10, 13, and 15); three counts of felony elder abuse (§ 368, subd. (b)(1); counts 3, 8, and 11); one count of misdemeanor elder abuse

[1] All undesignated statutory references are to the Penal Code.

(§ 368, subd. (c); count 16); and one count of misdemeanor battery (§ 242; count 17).[2] As to the robbery and burglary offenses charged in counts 1, 2, 6, 7, 9, 10, 12, and 13, the information alleged the crimes were committed on an elderly victim (§ 667.9, subd. (a)). The information also alleged that between 1992 and 2004 defendant had suffered three prison priors (§ 667.5, subd. (b)), 11 serious felony priors (§ 667, subd. (a)(1)), and 11 strikes (§§ 667, subds. (d)–(e), 1170.12, subds. (b)–(c)).

The jury found defendant guilty on all counts except count 17 (misdemeanor battery), which the court dismissed on motion of the prosecution. The jury also found true the enhancement allegations, and defendant admitted all 11 priors. On September 6, 2017, the trial court sentenced defendant to 327 years to life, consecutive to life in prison.

DISCUSSION

The Trial Court Properly Admitted the Identification Testimony from Officer Huang

Defendant's first argument is that the trial court erred in allowing San Francisco Police Officer Edwin Huang to testify as to the identity of a person on a surveillance camera, and thus the convictions on counts 6, 7, and 8 cannot stand.

Factual and Procedural Background

Counts 6, 7, and 8 involved an incident on April 30, 2014 in an apartment on Post Street (the Post Street property). The apartment was occupied by Suzako Berne, who was 90 years old, five feet five inches tall, and weighed 115 pounds. Berne testified that around 10:20 a.m. on April 30 she responded to a knock on the door, and a man pushed his way in.[3] Sitting in a kitchen chair, the man grabbed Berne's hand and asked, "Where's the money?" Opening her purse, the man pushed Berne to the floor and put his knee in her back, which caused Berne to hurt for some two weeks. Then, over Berne's resistance, the man took her wallet out of her purse and left, with her identification card and some $175 inside.

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[2] Before closing argument, the prosecutor successfully moved to amend the information to reflect four counts of misdemeanor elder abuse (counts 3, 8, 11, 16) instead of three counts of felony elder abuse and one count of misdemeanor elder abuse.

[3] Berne died before trial, and her testimony came in through a video.

Berne described the intruder as Black, with "inch and a half" hair, about five feet six to five feet seven inches tall, and well built; he was, she said, very dark, might have had a mustache, and appeared to be in his late 40s.

The Post Street property had surveillance cameras, footage from which showed a man in the apartment building between 10:14 and 10:27 a.m. on April 30. And shown an image from the surveillance video, Berne identified the person as the man who entered her apartment.

The Post Street property manager gave the surveillance footage to the San Francisco police. It was reviewed by Officer Edwin Huang who testified before the jury that "around April 30, 2014" he viewed the video several times, doing so on an average size computer for a "few seconds," which, it would develop, led ultimately to Huang's conduct on May 21 when, while conducting undercover surveillance in Chinatown, he saw defendant at Stockton and Clay Streets and decided to follow him because, Huang said, defendant was "a person of interest." At that point, the prosecutor interrupted Huang's answer, asking the court for a break, as he wanted to "make sure [Huang's] answer doesn't get into impermissible evidence."

The court took the morning recess, followed immediately by an Evidence Code section 402 hearing. There, Huang testified he reviewed the surveillance footage sometime before May 21, at which time the police had not identified defendant as a person of interest in the burglaries and robberies that had occurred. Huang testified the footage showed a Black man "piggybacking in the doorway, into the entryway of a lobby," and "soon after . . . running out of the door"; he saw "the top of [the man's] head [and] his facial features," and "was able to . . . make out certain features," including a "pretty pronounced" widow's peak. Asked if viewing the security video factored into his decision to follow defendant on May 21, Huang answered, "Yes. . . . Based on the facial features and his build, it's a very similar description, and the age proximity as well." On cross-examination, Huang was asked about his training in identifying people, and responded: "[B]ased on my experience in conducting numerous hours of surveillance and looking at a possible subject and matching that with another subject, based on facial

features, as well as clothing and gait, I feel comfortable sometimes with identifying a person based on that."

The prosecutor argued Officer Huang should be allowed to testify as to the reason he decided to follow defendant on May 21, that he believed defendant was the person in the video from Berne's apartment building, that a proper foundation had been laid for Huang's opinion that defendant was the person in the video. In his words, Huang's interaction with defendant on May 21 was sufficient for Huang to "make pretty serious observations about [defendant's] mannerisms, the way he looked, such that [Officer Huang] could make an identification on the video and provide that proper lay opinion to the jury."

Defense counsel objected that Huang should not be allowed to testify that defendant was the person in the video on the basis of viewing a three-second video, that Huang had never seen defendant in person before May 21 and thus should not be allowed to testify that he followed defendant because he looked like the person in the video. Counsel also objected that the video was not clear, that Huang was not a facial recognition expert, and that his proposed "identification" would violate the principles laid out in *People v. Mixon* (1982) 129 Cal.App.3d 118, 128. Finally, counsel urged the evidence would not survive an evaluation under Evidence Code section 352 because "police identifications . . . have too much weight for their own good," going on to assert that the court should exclude the testimony "for the sake of justice" because the officer "passing a judgment in front of the jury" was "subverting their province, which is to identify and to come to a conclusion on all elements of the crime, including identity."

The trial court found that Officer Huang's interaction with defendant inside the Stockton Street apartment building on May 21 was "ample prior contact" for him to testify to defendant's identity at trial, adding, "[W]hat I mean by 'ample,' I mean that the interaction he had with [defendant] is sufficient for the Court to indicate that there's credibility. He can testify as to the appearance and/or interaction and identify [defendant]." The court also found that the video "speaks for itself," and that Officer Huang's familiarity with defendant went "to the weight, not admissibility." And

addressing the Evidence Code section 352 issue, the court said, "I don't think it's confusing. I don't think it's going to be misleading, and I don't think it's going to be too much consumption of time. And everything is prejudicial."

Resuming the stand, Officer Huang testified that he viewed the surveillance footage from Berne's apartment building soon after Berne reported the incident on April 30, and also viewed a still image taken from the footage. And it was watching the video that led him to follow defendant into the Stockton Street apartment building on May 21 because he thought defendant resembled the person in the video "[b]ased on the similarities of the features, approximately 50-year-old [B]lack male." Huang was asked on cross-examination, "Would it be fair to say that you cannot see the particular details of the person's face because of the color of the photograph or the quality of the still image?" Officer Huang replied, "I think I can make a reasonable identification to say that it was your client," adding that "[t]here [are] particular details on [the still image] that would be consistent with [defendant's] features." Finally, asked about his training in identifying people, Officer Huang stated, "As far as my training and experience, it would be a lot of—thousands of hours of surveillance, as well as looking at surveillance, still images, comparing, and looking at suspect behavior, whether it be their gait, certain characteristics of a person." And, he opined, defendant was the person in the surveillance video.

Analysis

Defendant argues that admission of Officer Huang's testimony violated defendant's right to due process, that the "testimony was impermissible under *People v. Mixon* (1982) 129 Cal.App.3d 118, 128 (*Mixon*) because Huang had never seen [defendant] in person when the surveillance video was taken, or when he first viewed it." We disagree.

The issue was discussed at length by the Supreme Court in *People v. Leon* (2015) 61 Cal.4th 569 (*Leon*), where defendant contended the trial court erred when it allowed a detective to identify defendant as the person seen in two surveillance videos. (*Id*. at p. 600.) Following the observation that such ruling is "reviewed for abuse of discretion"

(*ibid*.), the court went on to reject defendant's claim, with the following reasoning: "A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800.) '[T]he identity of a person is a proper subject of nonexpert opinion . . . .' (*People v. Perry* (1976) 60 Cal.App.3d 608, 612; accord, *People v. Mixon, supra*, 129 Cal.App.3d at p. 127.) [¶] Court of Appeal decisions have long upheld admission of testimony identifying defendants in surveillance footage or photographs." (*Leon* at p. 601.) Then, addressing a claim similar, if not identical, to the claim by defendant here, the Supreme Court concluded with this: "Defendant distinguishes these cases because [the officer] did not have contact with him *before* the crimes. [Citation.] This is a distinction without a difference. It is undisputed [the officer] was familiar with defendant's appearance around the time of the crimes. Their contact began when defendant was arrested, one day after the Valley Market robbery. Questions about the extent of [the officer's] familiarity with defendant's appearance went to the weight, not the admissibility, of his testimony. [Citation.] . . . Moreover, because the surveillance video was played for the jury, jurors could make up their own minds about whether the person shown was defendant. Because [the officer's] testimony was based on his relevant personal knowledge and aided the jury, the court did not abuse its discretion by admitting it." (*Ibid.*)

In his leading treatise on California Evidence, our esteemed colleague Justice Simons sums up the law this way: "A person may give an opinion that a perpetrator shown in a surveillance video is the defendant. (*People v. Leon*, 61 Cal.4th 569, 600–601.) The degree of familiarity with the subject goes to the weight and not the admissibility of the lay opinion testimony. (*Leon*, 61 Cal.4th at p. 601) (*People v. Larkins*, 199 Cal.App.4th 1059, 1066–1068 (4th Dist. 2011).) A detective may explain why a murder investigation began to focus on the defendant by testifying that a composite of the suspect viewed by the detective 'kind of resembled' the defendant. (*People v. Virgil*, 51 Cal.4th 1210, 1253–1254 (2011).)" (Simons, Cal. Evidence Manual (2019) § 4:38, p. 369.)

Defendant relies primarily on *Mixon, supra,* 129 Cal.App.3d 118, arguing as follows: " '[C]ases have recognized certain prerequisites to the admissibility of photographic identification testimony, *particularly when such testimony comes from law enforcement officers*.' (*Id.* at p. 127, emphasis added.) Those predicates require that: '(1) the witness testify from personal knowledge of the defendant's appearance *at or before the time the [image] was taken*; and (2) the testimony aid the trier of fact in determining the crucial identity issue.' (*Id*. at p. 128, emphasis added.)"

The complete answer to predicate one, the "at or before" language, is found in *Leon*, where the Supreme Court held that the testifying witness needs personal knowledge of the person's appearance sometime "around" the time of the crime. (*Leon, supra,* 61 Cal.4th at p. 601.) That, of course, applies to Huang here.

As to the second "predicate" in *Mixon*, defendant claims Officer Huang's testimony was inadmissible because the jury was capable of making the same comparisons and deciding for itself whether defendant was the suspect shown in the security video. A lay witness's opinion, however, need not be necessary to be admissible; it must merely "aid[] the jury," as it did here. (*Leon, supra,* 61 Cal.4th at p. 601; see Evid. Code, § 800.)

Finally, even if there was error, it was necessarily harmless. (*People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Watson* (1956) 46 Cal.2d 818, 836.) To begin with, the evidence from victim Berne is compelling, as she identified the intruder consistent with defendant's physical appearance: Black, in his late 40's, about five feet six or seven inches tall, short haired, and well built. And cell phone tower data placed defendant near Berne's apartment at 10:13 a.m. on the day in question. Perhaps most significantly—and contrary to defendant's assertion—Berne identified defendant in the still image taken from the security footage as the person who robbed her.

Beyond all that, the jury saw the surveillance video for itself, and thus could make up its own mind. (See *Leon, supra,* 61 Cal.4th at p. 601 ["[B]ecause the surveillance video was played for the jury, jurors could make up their own minds about whether the person shown was defendant"]; *People v. Larkins*, *supra*, 199 Cal.App.4th at p. 1067

[same].) Additionally, the jurors were instructed that they "must decide what the facts [were]" and that "it [was] up to all of [them], and [them] alone to decide what happened." (See CALCRIM No. 200.) Moreover, the jury was instructed that it was to give a lay witness's opinion whatever weight it felt appropriate based upon its own review of the evidence and of the witness's opportunity to perceive the relevant factors.

The Trial Court Committed Errors in Sentencing

Defendant's next three arguments assert errors made by the trial court in sentencing, arguments with which the Attorney General agrees. So do we, as we briefly discuss.

The Elderly Victim Enhancements in Courts 14 and 15 Were Wrong

Section 1170.1, subdivision (e) provides that "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (*People v. Mosley* (2015) 60 Cal.4th 1044, 1056.) Here, the information alleged a one-year enhancement for an elderly victim (§ 667.9, subd. (a)) in eight counts: 1, 2, 6, 7, 9, 10, 12, and 13. The jury found true those enhancement allegations, and the trial court sentenced defendant accordingly. However, the court also imposed an elderly victim enhancement on counts 14 and 15, even though no such enhancements had been alleged in the information or found true by the jury. Those enhancements must be stricken.

The Sentence Was Wrong

Defendant claims the trial court erred in sentencing him to 327 years to life consecutive to life in prison, and that he should have been sentenced to 326 years to life, consecutive to 104 years in prison. Again, the Attorney General agrees. Supporting such agreement, the Attorney General discusses the situation for over three pages, including the background, the convictions, and the three strikes law. After all that, the Attorney General sets forth his conclusion, as follows:

"As [defendant] recognizes [citation], section 677, subdivision (e)(2)(A)(iii) provides the greatest minimum term for each of his convictions. As to counts 1, 2, 6, 7, 9, 10, 12, and 13, [defendant's] sentence should be modified to 27 years to life,

consecutive to 21 years for each count. The 27-year minimum term is calculated as follows: the upper term of six years for the substantive offense of first degree robbery (§§ 211, 213, subd. (a)(1)(B)) or first degree burglary (§§ 459, 460, subd. (a), 461, subd. (a)), plus one year for the elderly victim finding (§ 667.9, subd. (a)), and 20 years for the four serious felony findings (five years for each prior) (§ 667, subd. (a)). Since the court imposed concurrent terms on counts 2, 7, 10, and 13, [defendant's] aggregate sentence for counts 1, 2, 6, 7, 9, 10, 12, and 13 is 108 years to life, consecutive to 84 years for the elderly victim and serious felony prior findings.

"As to counts 4, 5, 14, and 15, [defendant's] sentence should be modified to 26 years to life, consecutive to 20 years for each count. The 26-year minimum term is calculated as follows: the upper term of six years for first degree robbery or first degree burglary, plus 20 years for the four serious felony findings. Since the court imposed a concurrent term on count 15, [defendant's] aggregate sentence for counts 4, 5, 14, and 15 is 78 years to life, consecutive to 60 years for the serious felony prior findings.

"Accordingly, [defendant's] sentence should be modified. (§ 1260.)"

Four of the Burglary Convictions Should Have Been Stayed

Counts 2, 7, 10, and 13 charged defendant with residential burglary, the information also alleging (in counts 1, 6, 9, and 12) that defendant robbed the burglary victims. The trial court instructed the jury about this, and the prosecutor argued defendant entered the victims' apartments with the intent to commit theft or robbery: "[Defendant's] hope is that he can make his way into any specific apartment and find somebody to rob, take money from," that he "had the intent to commit a theft or a robbery inside of" the apartment.

The prosecution's sentencing memorandum stated that punishment for counts 2, 7, 10, and 13 "fall under Penal Code section 654" in light of the robbery convictions involving the victims of those crimes. Despite that, the trial court imposed concurrent terms on those counts, without any analysis whether punishment for those convictions should have been stayed under section 654.

The punishment for these counts should have been stayed. (See *People v. Islas* (2012) 210 Cal.App.4th 116, 130 ["When a defendant is convicted of burglary and the intended felony underlying the burglary, section 654 prohibits punishment for both crimes"].)

The Cruel and Unusual Punishment Claim Is Premature

As noted, defendant was convicted of 16 crimes—12 felonies and four misdemeanors—arising out of seven burglaries, burglaries that targeted elderly victims, many of whom he robbed and injured. The crimes included five first degree robberies and seven first degree burglaries. Those crimes were against the background that defendant had 11 prior convictions, including for first degree burglary, first degree burglary, second degree robbery, and attempted first degree burglary, for three of which defendant served prior terms. He is what might be called a career criminal.

Against that background, as defendant's brief describes it, he "urged the Court to impose a 26-year sentence he could complete by the time he turned 79."[4] At sentencing, the court heard from defendant who for over four pages read from various letters he had written, concluding with a letter to the trial court that ended with this: "I deserve every day I'm going to do, every day you're going to give me. But I'm fortunate at my age that I'm going to have enough of my life back that I can start over again and be able to get out and be successful, successful in life. Just know, your Honor, that I am deeply sorry for the lives that I have ruined, for the suffering that I've caused each and every one, and for the damage I've done. From the bottom of my heart, I am sorry. [¶] That's it. Thank you, your Honor."

The trial court responded by first noting some of the victims it "just couldn't forget," concluding its preliminary remarks with the observation that the court was "very glad that you wrote a letter out to the victims. Ms. Berne's daughter is here. I've heard her statement, and I've heard yours. And, Mr. Woods, there's a lot of good in you. And

[4] This appears inconsistent with defendant's own statement to the court at sentencing, where he said he was "60 years old now."

I hope the time that you are incarcerated gives you time to reflect and be a better person. [¶] . . . [¶] So thank you, Mr. Woods. I appreciate everything that you said today."

Then turning to the sentencing, the court noted that defendant "must be sentenced to state prison under the Three Strikes Law. Because there are seven separate incidents involving strike convictions in this case. [¶] The court must render the sentences for each incident consecutively and under certain counts concurrently, all of which are under the parameters laid out in Penal Code Section 667(d), 667(e)(1), 1170.12(a), 1170.12(b), and [the] California Rule of Court 4.425. [¶] Sentencing in this case is doubled by the indeterminate sentencing law, and the Court is mandated and required and must apply the sentencing scheme that will impose the greatest minimum." The court went on, count by count, to conclude that the "total sentence will be 327 years consecutive to life, indeterminate sentences."

Defendant's last argument is that the sentence, even if modified, as agreed to by the Attorney General is cruel and unusual. His fundamental argument is that such sentence serves "no legitimate penal purpose." (See generally *Coker v. Georgia* (1977) 433 U.S. 584, 592.) And, defendant sums up, California's "Legislature has recently declared that 'the purpose of sentencing is public safety achieved through punishment, *rehabilitation*, and restorative justice." (§ 1170.1, subd. (a), emphasis added.)"

The Attorney General vigorously disagrees and, pointing to defendant's past and present crimes, asserts he "has demonstrated an inability to curb his criminality and has a propensity for committing two particular crimes—robbery and burglary. Under the circumstances of this case, a finding of cruel and unusual punishment is unwarranted." And, the Attorney General continues, "prison terms in excess of life expectancy are not unusual and are frequently upheld. (*People v. Retanan* (2007) 154 Cal.App.4th 1229, 1231; see, e.g., [*People v.*] *Byrd* [(2001)] 89 Cal.App.4th [1373], 1382 [559 years to life for multiple robberies and other crimes]; *People v. Wallace* (1993) 14 Cal.App.4th 651 666–667 [283 years 8 months for multiple sex offenses]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531–532 [129 years for multiple sex crimes].) Indeed, appellate courts have held that lengthy sentences for multiple counts of robbery do not constitute

cruel and/or unusual punishment under the federal and state Constitutions. (See *People v. Sullivan* (2007) 151 Cal.App.4th 524, 568–573 [210 years to life for six counts of robbery] . . . .) Appellant's sentence is not excessive and his claim of cruel and unusual punishment necessarily fails."

We need not decide the issue here, as the sentencing errors necessarily result in a sentence different than the one from which defendant appeals here. And despite the Attorney General's agreement, how much different is yet to be properly determined, and it will be that sentence against which the law must be applied.

DISPOSITION

The judgment of conviction is affirmed, but the matter is remanded for resentencing in accordance with the views set forth herein.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

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